Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.,

Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, *et al.*,

Respondents.

Petition for Writ of Certiorari to the Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under a Colorado criminal law, no one may distribute leaflets, orally counsel, educate or protest, or display signs, within eight feet of another person, while within one hundred feet of the entrance to a medical facility, unless the speaker first seeks and gets consent from the other person. C.R.S. § 18-9-122(3). A speaker commits a crime if he communicates by any of these methods, without consent, while within eight feet of any person to whom the communication is addressed. The following questions are presented:

1. Does Colorado's statutory requirement that speakers obtain consent from passersby on public sidewalks and streets before speaking, displaying signs, or distributing leaflets unconstitutionally burden protected expressive rights in a traditional public forum?

2. Does Colorado's statutory designation of private citizens as censors of speech, picket signs, and leaflets on public streets and sidewalks impose an unconstitutional prior restraint?

3. Is a statute that gives broad discretion to passersby in public places to act as censors of speech, picket signs, and leaflets and which fails to prohibit content-based denials of the right to speak, to display signs, or to pass leaflets subject to strict scrutiny?

4. Is a statute that gives broad discretion to passersby in public places to act as censors of speech, picket signs, and leaflets and which fails to prohibit viewpoint-based denials of the right to speak, to display signs, or to pass leaflets unconstitutional per se?

PARTIES

All of the petitioners are listed in the caption on the cover. None of the petitioners is a corporation. *See* Rule 29.6.

In addition to the respondents listed in the caption on the cover, the following persons or entities were respondents in the proceedings below and are respondents in this Court:

The State of Colorado, Bill Owens, Governor; David J. Thomas, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; The City of Lakewood, Colorado; and, Ken Salazar, in His Official Capacity as Attorney General of the State of Colorado.

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DECISIONS BELOW

The decision of the trial court is unpublished. App. at 30a. The first decision of the Colorado Court of Appeals is published. *See Hill v. City of Lakewood*, 911 P.2d 670 (Colo. App. 1995); App. at 38a. This Court's Order, granting the Petition in *Hill v. Colorado*, No. 95-1905, vacating the first decision of the Colorado Court of Appeals, and remanding for further consideration is published. *See Hill v. Colorado*, 519 U.S. 1145 (1997) (Mem.); App. at 47a, 48a. The decision of the Colorado Court of Appeals on remand from this Court is published. *See Hill v. City of Lakewood*, 949 P.2d 107 (Colo. App. 1997); App. at 51a. The decision of the Colorado Supreme Court is published. *See Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999); App. at 1a.

JURISDICTION

The Colorado Supreme Court issued its opinion affirming the judgment of the Colorado Court of Appeals on February 16, 1999. This Court has jurisdiction under Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The following constitutional and statutory provisions involved in this case are set forth in the Appendix to the Petition: United States Constitution amends. I and XIV § 1; Colorado Revised Statutes § 18-9-122.

STATEMENT OF THE CASE

The Colorado Supreme Court upheld the constitutionality of a statute making it a criminal offense to distribute literature, display picket signs, or orally protest, counsel or educate, in public places, under the circumstances contemplated in the

statute. The court did so despite the statute's direct ban on speech on public streets and sidewalks in Colorado.

C.R.S. § 18-9-122(3) imposes criminal liability on anyone within 100 feet of the entrance door to a health care facility who, without first obtaining permission to do so and while within eight feet of another person, passes a leaflet to, displays a sign to, or directs oral protests, counseling or education to that other person. App. at 65a.

A. Statement of Material Facts

Leila Jeanne Hill, Audrey Himmelmann and Everitt Simpson are "sidewalk counselors" – they offer abortion-bound women alternatives to abortion.[1] They inform passersby on public sidewalks about abortion and abortion alternatives orally, by sign displays, and by leafleting.[2] They make cards, leaflets, and pamphlets,[3] and distribute them near businesses where abortions are performed.[4] They make posters about abortion to display in public.[5] Petitioners have counseled or protested in various places around Colorado.[6]

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1. R. 4, 112-14, 148-49, 151-53. References herein are made to the record transmitted from the Jefferson County District Court to the Colorado Court of Appeals. Those references are indicated as "R.__."

2. R. 4, 112-14, 148-49, 151-53.

3. R. 4, 112-14, 148-49, 151-53.

4. R. 4, 112-14, 148-49, 151-53.

5. R. 4, 112-14, 148-49, 151-53.

6. R. 113, 149, 151-52.

In 1993, the Colorado General Assembly enacted C.R.S. § 18-9-122(3).[7] The statute requires a speaker, whenever he is within 100 feet of the entrance door to a medical facility, to obtain consent from any other person before approaching within eight feet of that person to hand a leaflet, display a sign, or engage in oral education, counseling or protest. App. at 65a. Absent the consent of the audience, speaking, displaying signs, or leafleting are all misdemeanor criminal offenses, as are speaking, displaying signs, or leafleting when consent has been denied. App. at 65a.[8]

Before C.R.S. § 18-9-122(3) was enacted, Petitioners spoke against human abortion on public sidewalks and ways within 100 feet of the entrance doors to abortion facilities.[9] They advised women near abortion businesses about alternatives to abortion. They spoke without fear of censorship,[10] or prosecution.[11]

When C.R.S. § 18-9-122(3) became law, Petitioners stopped or altered their activities out of fear of prosecution. Simpson completely discontinued his expressive activities within 100

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7. The text of the Act is set out in the Appendix to the Petition at 64a-65a.

8. Class 3 misdemeanors in Colorado are punishable by fines of up to one hundred fifty dollars, and imprisonment of up to seven months. C.R.S. § 18-1-106.

9. R. 4, 112-14, 148-49, 151-53.

10. R. 4, 112-14, 148-49, 151-53.

11. R. 4, 112-14, 148-49, 151-53.

feet of abortion facility entrances.[12] Hill and Himmelmann changed their activities to avoid prosecution.[13] These changes have made their efforts more risky, more difficult, and less effective. They have found it impossible, at times, to remain on the sidewalk, keep at least eight feet away from others and continue to speak, display signs or otherwise protest or counsel.[14]

B. Statement on Preservation Below of Federal Questions

The federal questions presented in this Petition have been the central focus of the dispute between the parties and the principal grounds of the decisions below. Petitioners sued in the District Court of Jefferson County, Colorado. Therein, Petitioners asserted that C.R.S. § 18-9-122(3) violated several federal constitutional rights. Petitioners alleged that C.R.S. § 18-9-122(3) violated their constitutional rights to freedom of speech, press, peaceable assembly, due process of law, and equal protection of the laws. *See* Verified Complaint ¶¶ 1, 5(b), 5(d), 56-64, 65-68, 69-73, 74-77, 78-79, *Hill v. Thomas*, No. 93CV1984 (Jefferson County District Court, Colo.).

1. *The trial court's treatment of the federal questions.*

The trial court granted summary judgment for the Respondents. App. at 36a. The trial court put the issues before it this way: "It is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment.

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12. R. 153.

13. R. 114, 149.

14. R. 113, 149, 153.

The issue before the Court is whether the statute reasonably regulates the activity within the limits proscribed [sic] by the Constitution." App. at 31a. The trial court held, "[t]here is no question that the Plaintiff's conduct implicates First Amendment rights[,]" App. at 31a-32a, and that "[t]he public sidewalks and streets, including the ones that the statute would apply, [sic] constitute 'quintessential' public forum [sic] for First Amendment purposes." *Id.* (discussing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)).

The trial court concluded that C.R.S. § 18-9-122(3) did not regulate speech according to its content or its viewpoint. The court held that, because the statute "applies not only to oral protest but to 'education' and 'counseling[,]'" the statute "applies to all viewpoints, rather then [sic] only certain viewpoints." App. at 49a. The trial court reasoned that the "statute in question applies even-handedly to all speakers and the content of their speech." *Id.* The court also found significant that "[a]ll persons demonstrating are to comply with the statute." *Id.*

The trial court found that C.R.S. § 18-9-122(3) was narrowly tailored because it "targets the offensive and disturbing conduct taking place outside health care facilities[,]" and "[i]t address[es] the exact source of evil it seeks to remedy." App. at 50a. The court also held that C.R.S. § 18-9-122(3) left open ample alternative channels of communication because it only operates within one hundred feet of the entrances to medical facilities and within eight feet of another person. *Id.*

The trial court also held that C.R.S. § 18-9-122(3) is not unconstitutionally overbroad because the statute was not so "sweeping in its scope as to deter both protected and unprotected speech." App. at 34a. Although its terms prohibit

any person from "knowingly approach[ing] another person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling," the trial court held that "the statute does not prohibit speech." App. at 35a. The trial court also concluded that the statute was not unconstitutionally vague and that it did not impose a prior restraint on expression. App. at 35a-36a.

2. *The Colorado Court of Appeals' treatment of the federal questions on its initial review*

The Colorado Court of Appeals affirmed. App. at 39a. The appeals court stated, "[t]he principal issue in this appeal is whether [the statute] violates the right to free speech contained in the First Amendment to the United States Constitution." *Id.*

The appeals court concluded that C.R.S. § 18-9-122(3) was content-neutral because it did "not address only the speech of anti-abortion protestors" and "would also apply to protest activity directed at patients requiring or seeking advice relative to an organ transplant." App. at 42a.

The appeals court found that the statute was "narrowly tailored" and "reasonably necessary to serve a significant government interest" in ensuring "safety and unobstructed access for patients and staff entering and departing from health care facilities." App. at 43a. The appeals court reasoned that ample alternative channels of communication remained open because "posters and signs may be made visible at eight feet[,]" and because "speech can continue at a distance of eight feet or more." *Id.*

The appeals court also concluded that the statute was not unconstitutionally vague, App. at 44a, and that it did not impose a system of prior restraints on expression. App. at 44a-

45a. The appeals court did not answer Petitioners' arguments that C.R.S. § 18-9-122(3) created a viewpoint-based restriction on free speech via its restriction on "oral protest" and the requirement of consent and that the statute was unconstitutionally overbroad.

Petitioners sought rehearing by the Colorado Court of Appeals but the request for rehearing was denied. App. at 60a. The Colorado Supreme Court denied review. App. at 46a.

3. *This Court's treatment of the prior petition*

Petitioners sought review of the appeals court decision in this Court. After deciding *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), this Court allowed the petition, vacated the judgment of the Colorado Court of Appeals, and remanded the case for further consideration in light of the *Schenck* decision. *See Hill v. Colorado*, 519 U.S. 1145 (1997); App. at 47a (order allowing writ); App. at 48a (order vacating judgment below and remanding).

4. *The Colorado Court of Appeals' treatment of the federal issues on remand from this Court*

On remand, the Colorado Court of Appeals again affirmed the trial court's judgment. App. at 52a. The appeals court decided that *Schenck* did not govern this case because *Schenck* involved an injunction whereas the instant case challenges a statute. App. at 55a. Instead, the appeals court applied the standard announced in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "Applying the *Ward* rationale here, we conclude that the statute meets constitutional muster." App. at 56a. Thus, the appeals court held, for the second time, that section 18-9-122(3) did not violate petitioners' First Amendment rights. App. at 57a.

5. *The Colorado Supreme Court's treatment of the federal questions*

Petitioners again sought review in the Colorado Supreme Court, which granted the petition. App. at 58a-59a.[15] The Colorado Supreme Court affirmed. App. at 2a, 29a.

The Colorado Supreme Court identified the state interest supporting C.R.S. § 18-9-122 as the "interest in preserving the health and safety of Colorado's citizens . . . as a means of assuring a citizen's access to medical 'counseling and treatment' at Colorado health care facilities." App. at 9a-10a. This interest was placed in opposition to the constitutional freedoms of speech, press, assembly as the Colorado Supreme Court subjected these expressive rights of the Petitioners to a balancing test. "Here, the fundamental right balanced against the First Amendment rights of petitioners is the right that the General Assembly determined was 'imperative,' a citizen's right of access to 'counseling and treatment' at Colorado medical facilities." App. at 14a (citations omitted). Ultimately, the Colorado Supreme Court concluded that "the First Amendment can accommodate reasonable government action intended to effectuate the free exercise of another fundamental

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15. The Colorado Supreme Court limited its review on certiorari to the following question:

> Whether the court of appeals erred in holding that section 18-9-122, 6 C.R.S. (1997), was constitutional upon the United States Supreme Court's remand to the court of appeals to reconsider the statute under *Schenck v. Pro-Choice Network*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).

App. at 59a. The Colorado Supreme Court specifically denied review "AS TO ALL OTHER ISSUES." *Id.* (emphasis in original).

right, an individual's right to privacy . . . ." App. at 16a.

In the court's view, *Schenck v. Pro-Choice Network* was not dispositive because "*Schenck* involved a judicially created preliminary injunction drawn solely for the parties before the Court" while "section 18-9-122(3) is not the creature of our judiciary, but, instead, is a statute crafted by a coordinate branch of government, and is a rule of general application representing the public policy choices of the General Assembly . . . ." App. at 16a. Instead, the Colorado Supreme Court decided that "the appropriate test to be applied in this case is found in *Ward v. Rock Against Racism*, 419 U.S. 781 (1989)." App. at 16a.

The Colorado Supreme Court concluded that the statute was narrowly tailored, advanced a significant government interest, and left open ample alternative channels of communication. App. at 24a-29a. "In sum," the court concluded, the statute "represents a fair legislative balancing of the 'right to protest or counsel against certain medical procedures' while protecting 'a person's right to obtain medical counseling and treatment.'" App. at 29a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The challenged statutory provision is functionally similar to the "consent to speak" provision struck down by this Court in *Madsen v. Women's Health Center, Inc.* 512 U.S. 743 (1994). Its operation is indistinguishable on any substantive basis from the zones, struck down in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), which "floated" in the public forum. The decision below upholding the challenged

Colorado statute squarely conflicts with the decisions of this Court.

A. The Decision Below Conflicts with this Court's Decisions in *Schenck v. Pro-Choice Network of Western New York* and *Madsen v. Women's Health Center, Inc.*

The challenged statute creates speech-free zones that float in public forum properties and that burden would-be speakers with the duty of obtaining consent before communicating with the public. The court below concluded that such zones were constitutional. The judgment below clearly conflict with this Court's cases.

1. *The Floating Zones*

In *Schenck v. Pro-Choice Network of Western New York, Inc.*, 519 U.S. 357 (1997), this Court struck down the portion of an injunction that created and enforced floating buffer zones near certain abortion businesses. *Id.* at 361. The floating zones were imposed as part of an injunction against anti-abortion activists who allegedly obstructed public passages, engaged in harassing conduct, and otherwise persistently disregarded New York criminal laws. *Id.* at 362-66.[16]

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16. In relevant part, the preliminary injunction provided:

"Defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order, are:

"1. Enjoined and restrained in any manner or by any means from:

This Court explained the operation of the floating zones in *Schenck* as follows: "The floating buffer zones prevent defendants--except for two sidewalk counselors, while they are tolerated by the targeted individual--from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." *Id.* at 377. This Court concluded that the imposition of these floating zones constituted a "broad prohibition, both because of the type of speech restricted and the nature of the location." The expressive activities affected by the injunction included "[l]eafleting and commenting on matters of public concern [which] are classic forms of speech that lie at the heart of the First Amendment . . . ." 519 U.S. at 377. The restrictions

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. . .

"(b) demonstrating . . . fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed;

"(c) . . . sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. . . ."

Id. at 376.

operated "in public areas" where speech "is at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Id.* (citation omitted).

Despite the "record of abusive conduct[,]" this Court concluded that, since the "broad speech prohibition 'float[ed]'" it was "unsustainable on th[e] record." *Id.* at 377.

Here, C.R.S. § 18-9-122(3) creates floating speech-free zones that restrict speech in the public forum. Yet, the Colorado Supreme Court upheld the constitutionality of just such zones.

2. *The Consent Requirement*

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), this Court struck down a substantially similar restriction on speech outside a Florida abortion business. The injunction in *Madsen* ordered protesters to "refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." 512 U.S. at 773.

This Court decided that the restriction was overbroad: "it is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* (emphasis in original). This Court held that, unless such a restriction is limited to speech that either is "independently proscribable," such as "'fighting words' or threats," "or is so infused with violence as to be indistinguishable from a threat of physical harm," such a "provision cannot stand." *Id.*

C.R.S. § 18-9-122(3) is not limited to proscribable speech.

It restricts peaceful, nonthreatening "oral protest," "education," "counseling," sign displays and leafleting. The lower courts declined to construe the statute otherwise. C.R.S. § 18-9-122(3) does not target precisely proscribable evils; the statute restricts *all* attempts to communicate with *any* person in those public places within the scope of the statute. The statute does not regulate *only* contact between speakers and patients or employees of medical facilities (though this still would be overbroad). Instead, anyone who is walking down a public street, within 100 feet of the entrance door to a medical facility, is given the power to restrict whether anyone else may speak, leaflet, or display signs. This Court's decision in *Madsen* is dispositive in invalidating such "consent to speak" requirements; the court below failed to obey the teaching of *Madsen*.

In *Madsen*, this Court reaffirmed "'that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" 512 U.S. at 774 (citation omitted). This Court declared: "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Id.*

Another section of the Colorado statute at issue directly prohibits obstructive conduct. *See* App. at 65a; C.R.S. § 18-9-122(2) (section prohibiting "knowingly obstruct[ing], detain[ing], hinder[ing], imped[ing], or block[ing] another person's entry to or exit from a health care facility"). The section challenged by Petitioners prohibits only speech. Even though C.R.S. § 18-9-122(3) "burdens more speech than is necessary to prevent intimidation and to ensure access" to

Colorado medical facilities, the court below found no constitutional infirmity in it. The decision below directly conflicts with this Court's decision in *Madsen* rejecting the imposition of a "consent to speak" requirement.

3. *Overbreadth*

In *Madsen*, this Court struck down the injunctive "bubble zone" because it restricted "*all* uninvited approaches . . . regardless of how peaceful the contact may be," 512 U.S. at 774, and it "burden[ed] more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* In a word, the consent provision was overbroad. The court below, however, concluded here that C.R.S. § 18-9-122(3) was not overbroad, despite the functional similarities between the injunctive zones in *Madsen* and the speech-restrictive zones created by C.R.S. § 18-9-122(3).

B. The Decision Below Conflicts with this Court's Decisions Regarding the Standard of Review for Content- and Viewpoint-Based Restrictions on Speech.

1. *Content-based restrictions on speech*

This Court has long held that content-based legislative restrictions on speech in traditional public fora are subject to the strictest scrutiny. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760-61 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-85 (1992); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 115-18 (1991); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Boos*

v. Barry, 485 U.S. 312, 321 (1988); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1987); *Carey v. Brown*, 447 U.S. 455, 460-63 (1980). In those decisions and others, this Court has explained that enactments are content-based when they embody direct restrictions on the content of speech *or* when they are crafted to allow restrictions on speech to be levied because of audience reactions to speech. C.R.S. § 18-9-122(3) is just such a statute.

In accord with this Court's decisions, the appropriate standard of review to have been applied to C.R.S. § 18-9-122(3) was the strict scrutiny applied routinely in cases of content-based governmental regulations of speech. C.R.S. § 18-9-122(3) burdens certain classes of oral utterance. It restricts oral *protest*, oral *education*, and oral *counseling*, and leaves unaffected other oral utterances. Consequently, the question of whether consent will be required to speak depends first on the content of the contemplated communication. If the words do not constitute protest, education, or counseling, consent is not needed. C.R.S. § 18-9-122(3) clearly targets only speech and expressive conduct, and its restrictions are plainly hinged on the content of speech.

Moreover, the statute subjects speech in public places to a requirement of consent. The statute does not prohibit citizen-censors from withholding their consent on the basis of their disagreement with, or disapproval of, the content of expression. Thus, the challenged statute is also content-based in this respect.

Nonetheless, the court below rejected this Court's repeated instruction to subject such a restriction to strict scrutiny. Instead, the court below analyzed C.R.S. § 18-9-122(3) under the more lenient standard of review for *content-neutral* regulations of time, place, or manner of expression. App. at 6a-

7a.

The choice of standards by the lower courts directly conflicts with this Court's decisions.

2. *Viewpoint-based restrictions on speech*

This Court has held that viewpoint-based restrictions on expression are unconstitutional, even in nonpublic fora. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-94 (1993) (citing cases). C.R.S. § 18-9-122(3) limits the right to speak in public places by imposing a requirement of consent to speak. The statute, however, does not cabin the discretion of citizen-censors who may withhold consent to would-be speakers based on disagreement with the viewpoints expressed. Nonetheless, the Colorado Supreme Court affirmed the constitutionality of the challenged statute.

C. The Decision Below Conflicts with this Court's Decisions on Prior Restraints of Speech.

An obligation to get permission from others before displaying a sign, passing a leaflet, or engaging in oral protest, education or counseling, is a prior restraint on free expression. C.R.S. § 18-9-122(3) is such a restraint. The statute fails constitutional scrutiny as such because it conveys unbridled discretion to those from whom a speaker must obtain consent to speak, because it imposes no time limits on the decision-maker, and because it provides none of the familiar, constitutional safeguards required by the Constitution in a system of prior restraint.

1. *Unbridled discretion*

This Court has said, "speakers need not obtain a license to speak." *Riley v. National Federation of the Blind*, 487 U.S. 781, 802 (1988). Regarding prior restraints, this Court has said, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of B.rmingham*, 394 U.S. 147, 150-51 (1969).[17] The right to be free from such previous restraints on expression is so important, this Court has said, that "a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Id.* at 151.

C.R.S. § 18-9-122(3) completely omits such standards. Instead, it deputizes the audience of any speech within 100 feet of medical facilities as censor with unbridled and unreviewable discretion. That the censor is a private party and not a government official is no more relevant here, *contra* App. at 45a, 52a, than it would be in a statute that subjected speech in public parks to the consent of other park-goers or subjected the showing of films in a theater to a private review board. The specter of such censorship inevitably induces *self*-censorship in

17. The problem of unbridled discretion in a scheme of prior restraints has been unambiguously expounded in an extended line of this Court's decisions. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth*; *Secretary of State v. Jos. H. Munson Co.*, 467 U.S. 947 (1984).

speakers who seek to communicate in traditional public forum properties. *Lakewood*, 486 U.S. at 757.

2. *No time limits for decision-making*

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court reiterated the rule that "the failure to place limitations on the time within which a censorship board decisionmaker must make a determination . . . is a species of unbridled discretion." *Id.* at 223 (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)). In *Riley*, this Court struck down a speech licensing scheme that failed to impose such time limitations. The lack of a time limitation was unconstitutional because, in such circumstances, "delay compel[led] silence." *Riley*, 487 U.S. at 802.

C.R.S. § 18-9-122(3) likewise does not set any limit on the time within which private citizens must act on requests for permission. Obviously, the time to address or hand a leaflet to a person en route to a building is fleeting. Here, as in *Riley*, delay in responding to an application for permission to speak compels silence.

3. *No procedural safeguards*

In *Freedman*, 380 U.S. at 58-60, this Court identified three procedural safeguards necessary to "obviate the dangers of a censorship system." 380 U.S. at 58. Those safeguards included burdening the censor with proving that the suppressed film was unprotected, *id.*, requiring the censor to obtain a judicial determination of whether the suppressed film constituted protected expression, *id.*, and limiting the denial of a license to "the shortest fixed period compatible with sound judicial resolution," *id.* at 59.

C.R.S. § 18-9-122(3) omits each of the procedural safeguards

identified in *Freedman* as essential in a system of prior restraints on speech to avoid facial constitutional invalidation.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF FEDERAL COURTS OF APPEALS AND A STATE COURT OF LAST RESORT.

A. Conflict with the United States Court of Appeals for the Ninth Circuit

On remand from this Court, the United States Court of Appeals for the Ninth Circuit struck down a similar "floating bubble zone" scheme imposed by an ordinance[18] of the City of

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18. The Phoenix Ordinance provided:

A. It is unlawful for any person, in the course of demonstration activity within the access area of a health care facility, to fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request.

B. For purposes of this section:

1. "Access area" means any portion of a public street or other public place or any place open to the public within one hundred (100) feet of an exterior wall or entryway of a health care facility.

2. "Demonstration activity" includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education or counseling activities.

3. "Health care facility" means any hospital, clinic, office, building or other place used to provide medical, psychological, nursing or other health care services, including family planning counseling and pregnancy-related services.

C. For purposes of this section, distance shall be measured from that

Phoenix, Arizona. *See Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997), *on remand from Sabelko v. City of Phoenix*, 519 U.S. 1144 (1997) (mem.). The Ninth Circuit reached its conclusion in light of this Court's decision in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). The Ninth Circuit stated: "floating buffer zones prevent leafleting and communication at a normal conversational distance, both 'classic forms of speech that lie at the heart of the First Amendment.'" *Sabelko*, 120 F.3d at 165 (citation omitted). The Ninth Circuit noted that, in *Schenck*, a "lack of certainty about how to comply with the injunction created a substantial risk that more speech would be burdened than the injunction prohibited." 120 F.3d at 165. The Ninth Circuit concluded, "[b]ecause other means might exist which would protect governmental interests and provide certainty regarding compliance, the Court held that the floating buffer zones burdened more speech than was necessary." *Id.*, at 165.

Applying *Schenck*, the Ninth Circuit determined:

> The Phoenix ordinance suffers the same defects as the injunction in Schenck. It contains a broad prohibition on speech with which it is difficult to comply without risking a violation of the ordinance. An individual within the access area to a clinic can invoke the eight-foot floating buffer zone, effectively preventing handbilling and normal

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part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. The term "body" includes any natural or artificial extension of a person's body including but not limited to an outstretched arm or a hand-held sign.

Sabelko v. City of Phoenix, 120 F.3d 161, 163 (9th Cir. 1997).

> conversation. Demonstrators who attempt communication with an individual must constantly monitor themselves to ensure that they don't encroach upon that individuals's or another individual's floating buffer zone. Further, the demonstrators are faced with the problem of determining which people within the access area have invoked the protection offered by the buffer zone.

Sabelko, 120 F.3d at 165.

The Phoenix Ordinance could be upheld as narrowly tailored, the *Sabelko* court only said, "'if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy.'" 120 F.3d at 165 (citations omitted). In this respect, "a Phoenix demonstrator would encounter difficulty in knowing how to remain compliant. This uncertainty concerning compliance establishes a substantial risk that more speech will be eliminated than the ordinance itself prohibits." *Id.* Consequently, the *Sabelko* court concluded, "the Phoenix ordinance lacks the narrow tailoring necessary to survive our scrutiny." *Id.*[19]

To the contrary, the Colorado Supreme Court here concluded that C.R.S. § 18-9-122(3) was narrowly tailored.

If anything, the Colorado statute is more obviously unconstitutional than the Phoenix ordinance invalidated in *Sabelko*. The Phoenix zones only became operative when "invoked," *Sabelko*, 120 F.3d at 163, but the Colorado zones are automatic, C.R.S. § 18-9-122(3). In other words, within 100 feet of a Phoenix medical facility, a speaker could approach

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19. The *Sabelko* court had no occasion to decide whether the Ordinance left open ample alternative channels of communication because it had concluded the Ordinance was not sufficiently narrowly tailored.

within 8 feet of another for purposes of handing a leaflet, engaging in oral advocacy, or displaying signs at least until the audience expressed a veto on the speech. In Colorado, however, within 100 feet of the entrance door to a podiatrist's office, a speaker dare not approach within 8 feet of another for the same expressive purposes, without *first* obtaining consent from the audience. The Ninth Circuit rejected the legislative imposition of floating bubble zones in traditional public fora. The court below affirmed the legislative creation of such zones, in reasoning directly in conflict with the decision of the Ninth Circuit.[20]

B. Conflict with the United States Court of Appeals for the Eighth Circuit

The decision below directly conflicts with the decision of the United States Court of Appeals for the Eighth Circuit in *United Food and Commercial Worker's Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988). In *IBP*, the Eighth Circuit affirmed a district court decision holding unconstitutional a Nebraska statute that provided,

> [a] person commits the offense of unlawful picketing if . . . he interferes, or attempts to interfere, with any other person in the exercise of his or her lawful right to work . . . by . . . persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such

20. After *Sabelko*, and in light of that decision and this Court's decision in *Schenck*, the United States Court of Appeals for the Ninth Circuit affirmed the grant of injunctive relief against a similar floating bubble zone ordinance imposed and enforced by the City of Santa Barbara, California. *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1217 (9th Cir. 1998), *cert. denied*, 119 S. Ct. ____ (1999).

purpose.

Neb. Rev. Stat. § 28-1317(1)(a) (1985) (quoted at 857 F.2d at 426). The Nebraska statute enforced a presumption that unwelcome words are unprotected. The court of appeals rebuffed that concept: "[t]hat the speech is unwelcome does not deprive it of protection." 857 F.2d at 432 (citations omitted).

Under the Nebraska statute, no consent to speak was required before communications were initiated, *see* Neb. Rev. Stat. § 28-1317(1)(a) (1985). C.R.S. § 18-9-122(3) does not even contain that extremely minimal limitation: the statute prohibits not only persistent communication, but also mere initiation of communication without consent. The decision sustaining the constitutionality of C.R.S. § 18-9-122(3) cannot be reconciled with the judgment of the Eighth Circuit in *IBP*.[21]

C. Conflict with the North Dakota Supreme Court

The decision below directly conflicts with the North Dakota Supreme Court's decision in *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 411

21. The decision below — affirming the constitutionality of a statute that "makes a crime out of what under the Constitution cannot be a crime" and that is "aimed directly at activity protected by the Constitution," *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) — is also inconsistent with a decision of the United States Court of Appeals for the Fourth Circuit in *NOW v. OR*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *rev'd in part on other grounds sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). In *NOW*, the Fourth Circuit affirmed a district court's order *refusing* to "broaden the scope" of an injunction "to include activities that tend to 'intimidate, harass or disturb patients or potential patients' because to do so would risk enjoining activities clearly protected by the First Amendment." 914 F.2d at 586.

(N.D. 1992).

In *Lambs of Christ*, the North Dakota Supreme Court struck down the provision of an injunction that prohibited "'speaking to staff and patients . . . who indicate that they do not wish to be spoken to'" and "'distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature.'" 488 N.W.2d at 407 n.1 (setting out provisions of injunction). Regarding the prohibitions on speaking and on distributing literature after a person expresses a wish not to receive it, the North Dakota Supreme Court held that "'speaking' to staff and patients cannot be constitutionally enjoined," *id.* at 411, and that "distributing literature is protected communicative activity" for which a complete ban would be inappropriate under the First Amendment, *id.*

In Colorado, however, leafleting, showing a sign or "speaking" *to anyone* who does not consent to be spoken to subjects a person to criminal prosecution, at least when such "speech" constitutes "oral protest, education or counseling" under the circumstances set forth in C.R.S. § 18-9-122(3). The decision below cannot be reconciled with the decision of the North Dakota Supreme Court in *Lambs of Christ*.

III. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE.

C.R.S. § 18-9-122(3) preconditions free speech, free press and peaceable assembly on a requirement of consent from passersby. The statute directly restricts activities entitled to substantial constitutional protection. While purporting to serve the State's interest in securing access to medical facilities, the

statute does not regulate obstructive activities, trespass, assaults or the use of threatening language. Instead, the statute is crafted in a way that reveals the State's true interest: suppressing free speech. C.R.S. § 18-9-122(3) prohibits speech, without a close fit between such expressive activities and the asserted interest of Colorado in insuring free access to medical facilities.

Colorado has codified a principle—audience veto power—which other communities might well wish to duplicate. For example, in Illinois, the residents of the Village of Skokie would have been able to prevent uniformed neo-Nazis from marching down that Village's streets. *Cf. National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). In Cummings, Georgia, if those city residents who lined the street to protest against it had been deputized to decide the question, that city would never have played host to the largest civil rights demonstration in the South since the 1960s. *Cf. Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992). And in Colorado, the State could cripple the initiative process by banning circulators from approaching qualified voters absent advance consent. *Cf. Meyer v. Grant*, 486 U.S. 414 (1988).

Colorado has not been alone in its use of speech-free "bubble zone" to restrict freedom of speech in the public forum. Since Colorado's enactment of C.R.S. § 18-9-122(3), the City of Phoenix, Arizona, enacted a similar provision under its city ordinances. That ordinance, however, has been declared unconstitutional and its enforcement has been enjoined. *See Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). The City of Santa Barbara, California, adopted a similar restriction. It, too, has been declared unconstitutional. *See Edwards v. City*

of Santa Barbara, 150 F.3d 1213 (9th Cir. 1998). These legislative enactments all disregard this Court's direct holding in *Madsen* on the unconstitutionality of "requirement of consent" provisions and this Court's direct holding in *Schenck* on the unconstitutionality of floating speech-free zones.

C.R.S. § 18-9-122(3) is a model for legislative enshrinement of the audience veto. It works incalculable injury to the rights of freedom of speech, freedom of the press, and freedom of assembly. The decision below, accepting and affirming government enforcement of private citizens' rights to veto expressive activities in public places, is inconsistent with the First and Fourteenth Amendments.

Just as troubling is the facile manner by which the Colorado Supreme Court has distorted this Court's decisions *Madsen* and in *Schenck* into a license to subject a facially overbroad, content-based, viewpoint-discriminatory statute to the very modest standard of review applicable to content-neutral, reasonable regulations of time, place and manner. This Court did not hold, in either *Madsen* or *Schenck*, that the consent requirement or the floating zones — which were unconstitutional even when limited to the context of an injunction against adjudged malefactors — would be constitutional if imposed by statute upon the general populace. The decisions below, however, assume just such a distorted approach to determination of the constitutional questions presented here.

CONCLUSION

The decisions below directly conflict with this Court's precedents, with decisions of the Eighth and Ninth Circuit Courts of Appeals, and with a decision of the North Dakota

Supreme Court. Moreover, the decision below distorts the jurisprudence governing the rights to freedom of speech, press, peaceable assembly, due process, and equal protection.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 17, 1999

APPENDIX

[Appendix A]

SUPREME COURT, STATE
OF COLORADO
No. 97SC630

February 16, 1999

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR., Petitioners,

v.

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; CITY OF LAKEWOOD, COLORADO; KEN SALAZAR, in his official capacity as Attorney General of the State of Colorado; and THE STATE OF COLORADO, BILL OWENS, Governor, Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

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Thornton, Colorado
The American Center for Law & Justice
Jay Alan Sekulow
Lawrenceville, Georgia
James Matthew Henderson, Sr.
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Justice SCOTT delivered the Opinion of the Court.

In this case we must decide whether a legislative enactment designed to protect the privacy rights of citizens entering and leaving Colorado health care facilities unduly burdens the First Amendment rights of other citizens. We conclude that it does not.

We granted certiorari in Hill v. City of Lakewood, 949 P.2d 107 (Colo.App.1997), to determine whether a Colorado statutory provision, in particular, section 18-9-122(3), 6 C.R.S. (1998), can withstand scrutiny under a facial First Amendment challenge. Section 18-9-122(3) provides "[n]o person shall knowingly approach another person within eight feet of such

person, unless such other person consents, for the purpose of ... counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility." In light of the order of remand by the United States Supreme Court to the Colorado Court of Appeals, our review is necessarily informed by the Supreme Court's opinion in Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).[1] Nonetheless, we rely upon the standard announced in Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). In doing so, while recognizing that the statute creates a limited floating buffer zone, we hold that, on its face, the statute does no more than place reasonable restrictions on speech that (1) are content-neutral; (2) are narrowly tailored to serve a significant government interest; and, (3) leave open ample alternative means for the communication of information petitioners seek to place into the marketplace of ideas. We so conclude because the standard announced in Ward permits greater deference for legislative enactments regulating speech than the Schenck standard, which places greater limitations upon the judicial regulation of speech through injunctive proceedings. We therefore uphold the statute against petitioners' facial attack and affirm the judgment of the court of appeals.

I.

Petitioners, Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr. (petitioners) filed a declaratory

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1. The issue upon which we granted certiorari was:

Whether the court of appeals erred in holding that section 18-9-122, 6 C.R.S. (1997), was constitutional upon the United States Supreme Court's remand to the court of appeals to reconsider the statute under Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).

judgment action and requested injunctive relief in Jefferson County District Court (trial court) under a facial challenge[2] to section 18-9-122(3), alleging that it violated the First Amendment and was therefore unconstitutional. Respondents, David J. Thomas in his official capacity as District Attorney for the First Judicial District of the State of Colorado, the City of Lakewood, and other officials of the State of Colorado,[3] (collectively, the State) filed a motion for summary judgment, asserting that section 18-9-122(3) was lawful as a constitutional time, place, and manner regulation of speech under the First Amendment to the United States Constitution. Petitioners filed a cross-motion for summary judgment alleging that section 18-9-122(3) was (1) facially unconstitutional as a prior restraint; (2) a content-based restriction lacking justification; and (3) unconstitutionally overbroad and vague.

In granting the State's motion for summary judgment, the trial court applied the standard set forth by the United States

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2. Petitioners' complaint alleged the statute was unconstitutional under both a facial and an as-applied challenge. However, as the statute had not yet been enforced, the trial court correctly ruled that the challenge was facial only. See High Gear & Toke Shop v. Beacom, 689 P.2d 624, 628 (Colo.1984). Therefore, our review here is limited to reviewing the facial challenge.

3. When originally filed, Gale Norton, as Attorney General, and Roy Romer, as Governor, were officers of the state of Colorado, sued in their official capacities. However, in January 1999, Bill Owens and Ken Salazar succeeded to the offices of Governor and Attorney General. Hence, by operation of law they are nominal parties in this proceeding, representing the State of Colorado in their official capacities only. See C.A.R. 43(c)(1) ("When a public officer is a party to an appeal or other proceedings in the appellate court in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party.").

Supreme Court in Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Applying that standard, the trial court found that section 18-9-122(3) was content-neutral, was narrowly tailored to serve a significant governmental interest, and left open ample alternative means of communication.

Petitioners appealed to the court of appeals, which affirmed the trial court's ruling. See Hill v. City of Lakewood, 911 P.2d 670 (Colo.App.1995) (Hill I). They then sought review in this court, which we denied. After the United States Supreme Court announced its decision in Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997), petitioners obtained review by petition to our nation's high court. Without an opinion, however, the United States Supreme Court vacated the judgment of the court of appeals in Hill I, and remanded the case to the court of appeals for reconsideration in light of Schenck. See Hill v. Colorado, 117 S.Ct. 1077 (1997).

On remand, the court of appeals determined that the test announced in Schenck was not applicable, and applied the standard announced by the Supreme Court in Ward. "Applying the Ward rationale here, we conclude that the statute meets constitutional muster." Hill v. City of Lakewood, 949 P.2d 107, 109-10 (Colo.App.1997) (Hill II). Thus, the court of appeals once again held that section 18-9-122(3) did not violate petitioners' First Amendment rights. See id. at 110.

We granted certiorari to review the important First Amendment issues raised by the judgment of the court of appeals. We now affirm that judgment.

II.

Shortly before 1993, many citizens seeking medical counseling and treatment at Colorado health care facilities were openly subjected to verbal abuse and on occasion, were physically assaulted while entering or leaving health care

facilities. Confronted by these threats to public safety and open, hostile, and sometimes violent confrontations in public places, the Colorado General Assembly held public hearings to determine the nature and extent of the danger posed by such acts to public safety. As a consequence of the testimony of several witnesses that revealed widespread, violent confrontations, the General Assembly undertook to develop a statute intended to acknowledge a citizen's "right to protest" or counsel against certain medical procedures while assuring that government protects a "person's right to obtain medical counseling and treatment." § 18-9-122(1), 6 C.R.S. (1998).

A.

In 1993, the General Assembly enacted section 18-9-122, entitled "Preventing passage to and from a health care facility--engaging in prohibited activities near facility" as part of Colorado's criminal code.[4]

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4. Comprised of six subsections, section 18-9-122 provides:

(1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

In subsection 18-9-122(1), the General Assembly set forth the public health considerations of "access to health care facilities," which it characterized as "imperative" for Colorado's citizens. "Balanc[ing]" the right to protest or counsel against certain medical procedures with another person's right to obtain medical counseling and treatment, the Colorado legislature sought to prohibit anyone from "knowingly obstructing another person's entry to or exit from a health care facility." § 18-9-122(1). Subsection 18-9-122(2) expressly classifies conduct by which a person "knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exist from a health care facility" as a "class 3 misdemeanor."[5] § 18-9 122(2).

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(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.

5. The penalty for committing a class 3 misdemeanor is a fine between fifty and one hundred fifty dollars, and up to seven months

Subsection 18-9-122(3), which is at issue here, creates a 100-foot radius zone around a health care facility, as a "fixed buffer zone." Within that fixed buffer zone only, no person may knowingly approach another within eight feet for the purpose of displaying a sign, engaging in oral protest, educating, counseling, or passing leaflets or handbills, unless the other person consents to such an approach. This eight-foot radius zone we call a "limited floating buffer zone."[6]

Section 18-9-122 was enacted by the General Assembly in response to concerns regarding open access to health care counseling and treatment at Colorado health care facilities. While the legislation was pending, the Colorado House and Senate Judiciary Committees heard testimony regarding abortion opponents' conduct at abortion clinics, including physically blocking entrances, intimidation, and harassment of individuals seeking services. A nurse practitioner who works at a clinic which provides, in part, abortion counseling and services, testified that anti-abortion protestors:

> yell, thrust signs in faces, and generally try to upset the patient as much as possible, which makes it much more difficult for us to provide care in a scary situation anyway . . . We have had to place security doors where there is [sic] double locks. People have to be rung in. Each

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imprisonment. See § 18-1-106, 6 C.R.S. (1998).

6. While the statute creates a floating buffer zone, we take care to make clear the following. The statute's limited floating buffer zone exists only within the 100 foot fixed buffer zone that protects entrances to health care facilities. Hence, there is no limitation placed upon a citizen's First Amendment conduct under the questioned statute outside the fixed buffer zone or more than 100 feet from the entrance. Thus, so long as a person intending to enter or exit a health care facility is more than 100 feet from the entrance, individuals exercising their First Amendment rights may engage in speech within eight feet of the person using the health care facility.

> of the doors, we have magnetic locks that slide because we have had our locks glued shut. We have had bicycle locks placed over handles so that we have had to remove some of the handles on the doors.

Hearings on H.B. 93-1209 Before the House Judiciary Committee, 59th General Assembly, 1st Reg. Sess. (Audio Tape 93-8, Feb. 12, 1993, at 7:42 a.m.). Another witness, a volunteer who escorts patients into and out of abortion clinics because of the harassment those patients face from anti-abortion protestors, testified that as patients are entering the clinic:

> the protestors are yelling and screaming. They are flashing their bloody fetus signs. They are yelling, "you are killing your baby." They are yelling at us as escorts that we are guards from Dachau [World War II Nazi concentration camp utilized to commit atrocities against people of Jewish ancestry] . . . they are talking about fetuses and babies being dismembered, arms and legs torn off . . . A young black woman came for services yesterday. They called her "mammy."

Id. This same witness testified that:

> a mother and her daughter had not heard the instructions from the clinic [to park in the parking lot] . . . They parked on the street. [While walking towards the clinic], they were immediately surrounded and yelled at and screamed at . . . The young woman was in tears . . . The mother looked at me and said, "I can't believe this happens in this country . . . my daughter was raped."

Id.

Testimony from various witnesses was compelling. With such a legislative history, it is obvious, and petitioners do not refute, that the General Assembly's actions were motivated by its interest in preserving the health and safety of Colorado's

citizens. In particular, the General Assembly enacted section 18-9-122 as a means of assuring a citizen's access to medical "counseling and treatment" at Colorado health care facilities.

B.

Petitioners are self-titled "sidewalk counselors."[7] "Sidewalk counselors" engage in efforts to educate, dissuade, inform and advise individuals about abortion and abortion alternatives. To accomplish these goals, petitioners utilize verbal communication, placards printed with anti-abortion statements and/or photographs, leaflets, and various other demonstrative devices, including plastic replicas of fetuses at various stages of development. The term "sidewalk" refers to petitioners' practice of performing these activities while standing on sidewalks and roadways outside health care facilities that provide abortion counseling, services, and procedures. Petitioners attempt to engage individuals entering the health care facility in conversation in order to dissuade those individuals from entering the facility and, presumably, obtaining abortions.

Petitioners argue that the Supreme Court's opinion in Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997), and its progeny, including Sabelko v. City of Phoenix, 120 F.3d 161 (9th Cir.1997), control. As a

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7. Although the legislative history of section 18-9-122 attributes intimidating and violent conduct to anti-abortion protestors generally, we assume, for purposes of this facial challenge to the statute, that petitioners have not engaged in, and do not intend to engage in, such dangerous and harassing conduct. We further note that instances of violence, including bombings of abortion clinics and other life threatening violence perpetrated against doctors and other medical personnel who provide abortion counseling and services, are not speech but, rather, constitute illegal conduct not protected by the First Amendment.

consequence, they argue, section 18-9-122(3) unconstitutionally restricts their First Amendment rights to protest outside of abortion clinics. In doing so, however, petitioners concede that the test for a time, place, and manner restriction is the appropriate measure of this statute's constitutionality. See Tape Recording of Oral Argument, Oct. 19, 1998, statement of James M. Henderson, Esq. Petitioners argue that pursuant to the test announced in Ward, the "floating buffer zone" created by section 18- 9-122(3) is not narrowly tailored to serve a significant government interest and that section 18-9-122(3) does not provide for ample alternative channels of communication. We disagree.

III.

Before addressing the petitioners' argument that their First Amendment rights have been abridged, we discuss the nature of petitioners' First Amendment rights. Then, we also review the "imperative" interest the General Assembly acted to serve, the fundamental right of privacy, access to medical counseling and treatment, against which petitioners' First Amendment rights must be balanced in this case.

A.

Repeated so often in our jurisprudence that we know it by rote, the First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I.[8]

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8. By force of the Civil War Amendments, in particular the Fourteenth Amendment, the First Amendment applies to the states via the Due Process Clause of the Fourteenth Amendment. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n. 1, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996); Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 99, 538 P.2d 450, 457 (1975), overruled on other grounds by Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103, 1106 (Colo.1982). " 'The freedom of speech ... [is] among the

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . .

Red Lion Broad. Co. v. Federal Communications Comm'n, 395 U.S. 367, 390, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). "If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating....' " Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n of New York, 447 U.S. 530, 537-538, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96; 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)). It is this very fundamental right, and its full and free exercise, that requires that government permit open debate.

The First Amendment contemplates that ideas will be tested in the marketplace, and not scrutinized by government censors. With a view towards its egalitarian nature, empowering even the least powerful among us, some view "the 'central meaning' of the First Amendment [as being] equality."[9] Laurence H.

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fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.' " Burson v. Freeman, 504 U.S. 191, 196, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (quoting Thornhill v. Alabama, 310 U.S. 88, 95, 60 S.Ct. 736, 84 L.Ed. 1093 (1940)).

9. This egalitarian nature of the First Amendment was evinced by the Civil Rights Era of the 1950's through the 1970's including (1) peaceful demonstrations and marches, some of which were lead by Rev. Dr. Martin Luther King, Jr., and (2) the work of the NAACP and the NAACP Legal Defense Fund, Inc., among others. See NAACP v. Claiborne Hardware, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215

Tribe Constitutional Choices 188 (1985) (quoting Kenneth Karst, "Equality as a Central Principle in the First Amendment" 43 U. Chi. L.Rev. 20, 21 (1975)).

The First Amendment, in effect, limits the choices government may make in its efforts to regulate or prohibit speech. See Consolidated Edison Co. of New York, Inc., 447 U.S. at 537-38 ("governments must not be allowed to choose which issues are worth discussing or debating").

However, the First Amendment is not an absolute prohibition and does not bar all government attempts to regulate speech. See Madsen v. Women's Health Center, Inc., 512 U.S. 753, 770, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (holding that an injunction establishing a thirty-six foot buffer zone around abortion clinic entrances does not violate protestor's First Amendment rights); see also People v. Baer, No. 97SA426, slip op. at 16 (Colo. Jan.25, 1999) (upholding conviction for harassment by stalking and noting that at least forty-eight states have enacted similar statutes). This is, perhaps, especially true when the questioned government action results from a particularly difficult reconciliation or "accommodation" of the right of free speech with another right fundamental in our constellation of rights. See Burson v. Freeman, 504 U.S. 191, 210, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992); Berring v. SHARE, 106 Wash.2d 212, 721 P.2d 918, 920 (Wash.1986) ("No judicial task is more difficult than balancing the constitutional

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(1982) (boycott seeking desegregation of public facilities, improved government services in black neighborhoods, and hiring of African Americans as police officers, social workers, and store clerks upheld against state tort laws). Influenced by Ghandi's philosophy of nonviolence, Dr. King led nonviolent demonstrations that helped lead to the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. A recipient of the Nobel Peace Prize, Dr. King was felled by the violence of an assassin's bullet. Dr. King's birthday is a national holiday observed in Colorado and throughout the United States.

rights and freedoms of citizens of this country against conflicting rights and freedoms of their fellow citizens."). It is this reconciliation or effort to accommodate the fundamental right of privacy in section 18-9-122(3) that is before us today.

B.

Here, the fundamental right balanced against the First Amendment rights of petitioners is the right that the General Assembly determined was "imperative," a citizen's right of access to "counseling and treatment" at Colorado medical facilities. At least one court has recognized that "the same constitution that protects the [anti-abortion protestors'] right to free speech also protects the [clinic's] right to abortion services and the patients' rights to receive those services." Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348 (3d Cir.), cert. denied, 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989) (holding that anti-abortion protestors could be liable for violations under federal Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1964(c)). "The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." Madsen, 512 U.S. at 772-73.

The right to privacy was first recognized by Justice Brandeis in 1890 in an article he co-authored with Samuel D. Warren describing it as "the right to be let alone." Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L.Rev. 193, 214-18 (1890). Justice Brandeis later expanded that statement when he explained that, "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized [individuals]." Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), rev'd on other grounds, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

The Supreme Court has recognized the right to privacy as one existing under the "penumbras" emanating from several

different provisions contained within our federal constitution's Bill of Rights, specifically the First, Third, Fourth, Fifth, and Ninth Amendments, as well as the Fourteenth Amendment. See Griswold v. Connecticut, 381 U.S. 479, 484-85, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). In Eisenstadt v. Baird, the Supreme Court explained that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (holding that a ban on distribution of contraceptive devices to unmarried persons violated the Equal Protection Clause); see also Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (holding that statute directing involuntary sterilization on criminal defendant violated Equal Protection Clause, since "[m]arriage and procreation are fundamental to the very existence and survival of the race").

In Roe v. Wade, the Supreme Court held that the fundamental right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). In so doing, the Court recognized the potential harm to those exercising this right due to unwarranted interference by others. See id. The Court concluded that, because of the extensive history of the right to privacy and because of its support in our Constitution and case law, only a compelling reason would justify government interference with its exercise. See id. at 155-56.

In consideration of the foregoing fundamental rights, we therefore take great care in reviewing government action challenged as impermissible under the First Amendment. However, we conclude that the First Amendment can accommodate reasonable government action intended to effectuate the free exercise of another fundamental right, an individual's right to privacy, here represented by access to

medical counseling and treatment.

IV.

We turn now to the principal issue upon which this case will be resolved: Whether section 18-9-122(3) is constitutional in light of the United States Supreme Court's decision in Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). We conclude that the test used to determine the constitutionality of the injunction imposed in Schenck is inapplicable to the instant case. We further conclude that the appropriate test to be applied in this case is found in Ward v. Rock Against Racism, 419 U.S. 781 (1989). We hold that section 18-9-122(3) is a reasonable time, place, and manner restriction and, hence, does not violate the proscriptions of the First Amendment. See n. 8, supra (recognizing that the First Amendment is applied to the State of Colorado by virtue of the Fourteenth Amendment).

A.

In Schenck, health care providers sought and obtained a preliminary injunction against anti-abortion protestors who engaged in allegedly illegal efforts to prevent individuals from obtaining abortions. See Schenck, 519 U.S. at 362. The Schenck injunction issued by the district court generally restricted the anti-abortion protestors' activities.[10]

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10. The injunction provided:

Defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order, are:

1. Enjoined and restrained in any manner or by any means from:

(a) trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility, including, but not limited to, the parking lots, parking lot entrances, driveways, and driveway entrances, at which abortions are performed in the Western District of New York;

(b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed;

(c) physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving, working at or using any services at any facility at which abortions are performed; provided, however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. In addition, it is further provided that this right to sidewalk counseling as defined herein shall not limit the right of the Police Department to maintain public order or such reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site;

(d) using any mechanical loudspeaker or sound amplification device or making any excessively loud sound which injures,

In Schenck, the protestors challenged the injunction claiming that three aspects of the injunction unconstitutionally restricted their First Amendment rights. In particular, the protestors challenged (1) the "floating" fifteen- foot buffer zone around people and vehicles accessing the clinics; (2) the "fixed" fifteen-foot buffer zone around the clinic's doorways, driveways and parking lot entrances; and, (3) the "cease and desist" provision that forced anti-abortion protestors within the buffer zones to retreat fifteen feet from the targeted person. Schenck, 519 U.S. at 371. The Supreme Court held that, while the fixed buffer zone was constitutionally permissible, the floating buffer zone was unconstitutional. See id. at 377, 380. Applying the test it established in Madsen, 512 U.S. at 765, for evaluating content-neutral injunctions that restrict speech, the Court held that the floating buffer zones burdened more speech than was necessary to serve the governmental interests underlying the issuance of the injunction. See Schenck, 519 U.S. at 377-79.

While we recognize certain factual similarities between Schenck and the instant case, that is, they both involve anti-abortion protestors' free speech claims regarding medical facilities which offer abortion counseling and they both create floating buffer zones, upon close examination, we cannot conclude that the test applied in Schenck is the appropriate

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> disturbs, or endangers the health or safety of any patient or employee of a health care facility at which abortions are performed, nor shall any person make such sounds which interfere with the rights of anyone not in violation of this Order;
>
> (e) attempting, or inducing, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a) through (d) above.

Schenck, 519 U.S. at 366-67.

standard by which to determine whether section 18-9-122(3) meets constitutional scrutiny. Our inability to agree with petitioners' reliance upon Schenck is based on an important distinction readily drawn between the two cases in the nature of the government regulation. Schenck involved a judicially created preliminary injunction drawn solely for the parties before the Court under the circumstances then existing. Here, to the contrary, section 18-9-122(3) is not the creature of our judiciary, but, instead, is a statute crafted by a coordinate branch of government, and is a rule of general application representing the public policy choices of the General Assembly of the State of Colorado.

As explained by the Supreme Court in Madsen, 512 U.S. at 763, one of the differences between judge-drawn injunctions and statutes crafted in the political process is that, "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances." As such, the General Assembly's enactment of section 18-9-122(3), which is not premised upon an evidentiary record for identifiable parties to litigation, but, instead intended for general application reaching all citizens, is entitled to greater deference than the judge-made injunction in Schenck. See Madsen, 512 U.S. at 763 (applying "a somewhat more stringent application of general First Amendment principles" when determining the constitutionality of an injunction). Thus, we conclude that to apply the appropriate standard for determining the constitutionality of a content-neutral statute, we rely upon Ward and not Schenck.

B.

Petitioners also urge us to rely on the Ninth Circuit's decision in Sabelko v. City of Phoenix, 120 F.3d 161 (9th Cir.1997). We decline to do so. As here, Sabelko was decided pursuant to a Supreme Court remand in light of Schenck. In response to the conduct of anti-abortion protestors outside abortion facilities,

Phoenix had enacted a city ordinance which created an eight-foot floating buffer zone and required counselors to withdraw upon request. See Sabelko, 120 F.3d at 162-63. Using the Ward test, the Ninth Circuit held the ordinance unconstitutional, concluding that it was not narrowly tailored. See Sabelko 120 F.3d at 165.

First, we note that authority from the Ninth Circuit, or any other lower federal court, is not controlling precedent for Colorado courts.

> Although the Supremacy Clause demands that state law yield to federal law, neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a federal court's interpretation other than that of the United States Supreme Court. Thus, we are not bound by . . .decisions of the lower federal courts.

Community Hosp. v. Fail, No. 97SC558, slip op. at 4 (Colo. Nov.30, 1998); see also Lockhart v. Fretwell, 506 U.S. 364, 375, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.").

Second, we conclude that Sabelko is factually distinguishable from the instant case. In Sabelko, anti-abortion protestors were required to withdraw from an approaching person, even if the protestor remained standing still, upon request. See 120 F.3d at 164. In other words, under the Sabelko ordinance, if a protestor stood still and an individual came within eight feet, the protestor would have violated the ordinance. Section 18-9-122(3), in contrast, imposes no such duty upon petitioners because of the "knowingly approaches" requirement, discussed below. Indeed, under our interpretation of its language, and as both parties conceded at oral argument, the statute is not

violated if petitioners stand still while inside the floating buffer zone. Hence, a petitioner who does not act to approach a person going into or coming out of a health care facility does not violate section 18-9-122(3), even if an individual comes within eight feet of him or her, as long as the petitioner does not "approach" the individual. See Part V. D., infra.

C.

While the protections afforded by the First Amendment are broad, they are also not limitless. "The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. " Heffron v. ISKCON, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (emphasis added). For example, if restriction of speech is facilitated by a content-neutral statute, "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place and manner restrictions." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); see also 7250 Corp. v. Board of County Comm'rs, 797 P.2d 917, 923-25 (Colo.1990).

Because government cannot favor one idea over another, its regulation of speech must be content-neutral. See Mosley, 408 U.S. at 95. A statute is content-neutral if it is " 'justified without reference to the content of the regulated speech.' " Ward, 491 U.S. at 791 (quoting Community for Creative Non-Violence, 468 U.S. at 295). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward, 491 U.S. at 791. In other words, a restriction on speech is content-neutral if the government makes no attempt to control the content of the speech protected and regulated thereby. See 7250 Corp., 799 P.2d at 925.

We note that both the trial court and the court of appeals found that section 18-9-122(3) is content-neutral, and that petitioners do not contend otherwise in this appeal. Further, our

review of that section satisfies us that it is, indeed, content-neutral. The restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech. Thus, we conclude that section 18-9- 122(3) is content-neutral, and, therefore, we shall apply the test announced in Ward.

V.

A.

Before applying that standard, however, we first review the Supreme Court's holding in Ward. In Ward, New York City promulgated what it termed "Use Guidelines" (guidelines) in an attempt to regulate the sound amplification systems used by Rock Against Racism (RAR), an organization sponsoring musical concerts to convey a message on New York City property. See Ward, 491 U.S. at 787. RAR in turn filed a successful motion for an injunction against enforcement of particular aspects of the guidelines. See id. at 788. RAR also sought damages and a declaratory judgment striking down the guidelines as facially invalid. See id. The district court, applying the three-part test for determining the constitutionality of time, place or manner restrictions, found the guidelines valid. See id. at 789. On appeal, the Second Circuit Court of Appeals reversed, based on its conclusion that the city could have used less restrictive means of regulating the volume of RAR's concert. See id.

The Supreme Court reversed the federal appellate court and upheld the constitutionality of the city's regulation of speech. In so doing, the Court utilized a two-part test for determining whether the content-neutral guidelines were constitutional. First, the Court inquired into whether the regulation was " 'narrowly tailored to serve a significant governmental interest.' " Id. at 796 (quoting Community for Creative Non-Violence, 468 U.S. at 293). Here, we note that the Court emphasized that the Second Circuit erred in holding that the regulation had to be

"'the least intrusive means' of achieving the desired end." Id. at 797. Rather, the Court explained, "our cases quite clearly hold that restrictions on time, place or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.' " Id. (quoting United States v. Albertini, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). The Court then clarified,

> [l]est any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.

491 U.S. at 798.

The Court then proceeded to the second, and final, requirement for finding a legislatively imposed restriction on speech constitutional, that the restriction leave ample alternative channels of communication open. See id. at 802. Here the Court explained the precise nature of permissible restriction of speech by stating, "[t]hat the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." Id. Thus, absent a showing that the resultant, permissible means of communicating information are inadequate for petitioners to express themselves, section 18-9-122(3) will be deemed to have left open ample alternatives, and therefore, should be upheld as constitutional.

Applying the standard set forth in Ward here, we hold that section 18-9- 122(3) is a reasonable restriction on the time, place, and manner of petitioners' speech and, therefore, is valid under the First Amendment for the reasons set forth below.

B.

First, section 18-9-122(3) is sufficiently narrowly drawn to further a significant government interest. The statute mandates that an individual can only be convicted of criminal conduct under specified circumstances. Specifically, section 18-9-122(3) prohibits an individual from knowingly approaching another person within eight feet: (1) for the purpose of oral protest, counseling, education, leafletting, or displaying a sign to that person; (2) within 100 feet of a health care facility entrance; (3) without that person's consent.

Petitioners contend that section 18-9-122(3) is not narrow because, although the General Assembly declared its intent to curtail threatening conduct, it only prohibits protected speech. We disagree. The plain language of the statute indicates that it regulates speech and the conduct of "passing a leaflet or handbill," and "displaying a sign." Petitioners also contend that because their speech is directed to everyone, including "innocent" passers-by on the sidewalk who are not entering the health care facility, the statute unduly restricts speech that is intended to be only directed towards passers- by. Again, we disagree.

In rather simple but straight-forward language, the statute prohibits individuals from "knowingly approaching " a person within eight feet without that person's consent. Under section 18-9-122(3), a criminal statute, two requirements must be met to constitute a violation: (1) the mens rea requirement, "knowingly"; and (2) the actus reus requirement, "approaches." If one of the petitioners is standing still within the fixed buffer zone, and an individual walks toward him or her, the petitioner need not change his or her physical positioning to maintain eight feet of distance and thus avoid violating the statute, even if the approaching individual comes within less than eight feet of the petitioner. In other words, so long as the petitioner remains still, he or she cannot commit the actus reus of approaching, even though he or she may well have the requisite mens rea of "knowingly." Thus, in any scenario, petitioners are

free to attempt to speak with whomever they wish and they will not violate the statute, so long as the mens rea and actus reus do not coincide. See Cooper v. People, No. 97SC662, slip op. at 13-14 (Colo. Jan.11, 1999). Therefore, any risk of an inadvertent violation involving an "innocent" passer-by is, at most, de minimus.

Admittedly, under the statute, petitioners may not "knowingly approach" an individual within eight feet unless the petitioner has obtained the individual's consent.[11] What renders this statute less restrictive than both the injunction in Schenck and the ordinance in Sabelko is that under section 18-9-122(3), there is no duty to withdraw placed upon petitioners even within the eight-foot limited floating buffer zone. Thus, an inadvertent violation caused by a third party is not a legitimate threat here, as all parties conceded at oral arguments.

Petitioners also contend that the statute is not narrow enough because it applies to all health care facilities in Colorado. The fact that the statute may apply to persons entering health care facilities beyond those providing abortion counseling does not render the statute overly restrictive of speech. Rather, simply and purposefully, that fact renders the statute comprehensive. Indeed, the applicability of the statute to situations other than anti-abortion protesting is one reason we conclude that the statute is content-neutral. And we decline any invitation on this record to conclude that a facet of a statute that renders it content-neutral necessarily renders it overly broad.

C.

Second, we also hold that the statute furthers a significant

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11. We emphasize here that this floating buffer zone exists only within 100 feet of the entrance and not outside the fixed buffer zone, such as parking lots and sidewalks outside the 100 foot fixed buffer zone.

government interest. After open public hearings that provide support for its public policy action we review today, the General Assembly declared in section 18-9-122(1) that "access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state." Indeed, the statute was enacted, in part, through the General Assembly's police power, and by a General Assembly that was concerned with the safety of individuals seeking wide-ranging health care services, not merely abortion counseling and procedures. See Hearings on H.B. 93-1209 Before the House Judiciary Committee, 59th General Assembly, 1st Reg. Sess. (Audio Tape 93-8, Feb. 12, 1993, at 7:42 a.m.); see also part II. A., supra. Clearly, a fair reading of the legislative record reflects a legislative response to conduct that subjected citizens in Colorado to harassing, confrontational, and violent conduct. See part II. A., supra. We conclude that that this express purpose furthers a significant government interest. See Schenck, 519 U.S. at 374-76 (holding that unimpeded access to clinics is a significant governmental interest); Madsen, 512 U.S. at 767 (holding that the government has a substantial interest "in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy"); Sabelko, 120 F.3d at 164 (same). Moreover, we note that it has long been acknowledged that government "may properly assert important interests in safeguarding health." Roe v. Wade, 410 U.S. at 150; see also Cox v. Louisiana, 379 U.S. 559, 562, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

D.

Finally, turning to the last requirement under Ward, that ample alternative channels of communication be left open, we similarly conclude that section 18-9-122(3) passes muster. Section 18-9-122(3) does not prohibit verbal communication, as petitioners contend. While the authority to regulate in some instances may include the power to deny, here petitioners' argument is not persuasive. Petitioners, indeed, everyone, are

still able to protest, counsel, shout, implore, dissuade, persuade, educate, inform, and distribute literature regarding abortion. They just cannot knowingly approach within eight feet of an individual who is within 100 feet of a health care facility entrance without that individual's consent. As articulated so well by the Supreme Court in Ward, "[t]hat [section 18-9-122(3)] may reduce to some degree the potential audience for [petitioners'] speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." Ward, 491 U.S. at 802. In fact, although leafleting is deterred under the statute, petitioners have failed to offer any credible evidence that normal conversation or the communication of their message through demonstrative devices, such as placards and photographs, limits communication of their message. Moreover, because petitioners may knowingly approach up to eight feet of any person, in the parking lot, on the sidewalk, and even at the health care facility door, under the statute at issue here, we fail to see how petitioners' audience is diminished at all. On its face, there is nothing that prohibits protestors from being seen and heard by those accessing health care facilities as well as passers-by.

It is important to emphasize that in Schenck the Supreme Court did not strike down all "floating" buffer zones per se, as the petitioners essentially contend. In striking down the floating buffer zones created by the injunction in Schenck, the Court recognized that "there may well be other ways to both effect ... separation and yet provide certainty (so that speech protected by the injunction's terms is not burdened)...." 519 U.S. at 378-79. In fact, it was the uncertainty of how to comply with the injunction about which the Supreme Court appeared most concerned. The Court stated that because the protestor would have to move with the individual, and because the clinic sidewalks were only seventeen-feet wide, "it would be quite difficult for a protestor who wishes to engage in peaceful expressive activities to know how to remain in compliance with

the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits." Id. at 378.

Here, in contrast, the statute is so narrowly drawn that these concerns are alleviated. First, protestors must only maintain a distance of eight feet, not fifteen, which allows for normal conversational tones. Second, where in Schenck a protestor could have easily violated the injunction merely by standing still if, for example, an individual approached a protestor, then that protestor would violate the injunction. Here, in contrast, the mens rea "knowingly" requirement ensures that scenario will not be possible. Even if a protestor is approached by an individual, the protestor will only violate the statute if, along with the several other requirements of the statute, he or she "knowingly approaches" the individual for the purpose of passing a leaflet or engaging in oral protest. The inadvertent violation, or at least the possibility of such a violation, is substantially avoided by the plain terms of the statute. In Schenck, in order to avoid violating the injunction, the protestors were obligated to maintain sufficient separation of fifteen feet at all times. There, the movement of a third party could place the protestors in the position of having violated the injunction. Here, to the contrary, petitioners may actually stand still and though individuals may approach within eight feet of petitioners, the requisite actus reus of "approach[ing]" is not met. Thus, we do not believe that, even under the Schenck test, section 18-9-122(3) burdens more speech than is necessary.

VI.

In sum, we hold that section 18-9-122(3) represents a fair legislative balancing of the "right to protest or counsel against certain medical procedures" while protecting "a person's right to obtain medical counseling and treatment." In addition, we find the General Assembly's statutory response a fair accommodation of two fundamental rights. We also conclude

that "the right to be let alone," Olmstead, 277 U.S. at 478, is consistent with the well-accepted notion that "[t]he First Amendment does not guarantee the right to communicate one's views ... in any manner that may be desired." Heffron, 452 U.S. at 647 (emphasis added).

Thus, we hold that section 18-9-122(3) is a valid time, place and manner restriction, a permissible legislative response designed to assure safety and order for citizens entering and leaving Colorado health care facilities. It is content-neutral, is narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels of communication. Accordingly, we affirm the judgment of the court of appeals.

[Appendix B]

DISTRICT COURT, COUNTY OF JEFFERSON,
STATE OF COLORADO
CASE NUMBER 93 CV 1984, DIVISION II - GFP

ORDER

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Plaintiffs,

-v-

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado:, THE CITY OF LAKEWOOD, COLORADO; GALE A. NORTON, in her official capacity as Attorney General for the State of Colorado; and STATE OF COLORADO, Roy Romer, Governor,

Defendants.

This matter comes before the Court on the Defendant's Motion for Summary Judgement. The Court finds that it has jurisdiction over the parties and subject matter of this action, and being fully advised in the premises has dispensed with a hearing on the motion pursuant to C.R.C.P. Rule 121, Section 1-15.

After reviewing the record, the Defendant's Motion, the Plaintiff's Response and the briefs submitted by the parties, the Court finds Pursuant to Rule 56 C.R.C.P., there are no genuine issues of material fact in dispute and that the issues presented are issues of law.

The Plaintiff's challenge C.R.S. Section 18-9-122 as (1) a violation of freedom of speech under the United States Constitution; (2) a violation of the freedom of press under the

United States Constitution; (3) a violation of right of peaceable assembly under the United States Constitution; (4) a violation of the due process clause of the United States Constitution; (5) a violation of the equal protection clause of the United States Constitution; and violative of applicable provisions of the Colorado State Constitution.

"[al statute is presumed constitutional... and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" Heller v. Doe, 113 S.Ct 2637, 2643 (1993), See also Parrish v. Lamm, 758 P.2d 1356, 1364 (Colo. 1988).

The Court finds that C.R.S. Section 18-9-122 has not been applied to the Plaintiffs. There is no showing by the Plaintiffs that any of them have been arrested, charged, cited. detained or referred for prosecution for violating any part of C.R.S. Section 18-9-122. See admissions of all Plaintiffs.

Therefore the Plaintiffs have only presented a facial challenge to the statute. Where a statute has not been enforced, the challenge is identified as facial. See High Gear and Toke Shop v. Beacom, 689 P.2d 624 (Colo. 1984). Therefore, the Court must examine on its face to determine whether C.R.S. Section 18-9-122 can be possibility construed as constitutional and avoid strained interpretations. People v. Smith, 862 P.2d 939 (Colo. 1993).

It is clear, and the parties agree, that the statute in question regulates activity protected by the First Amendment. The issue before the Court is whether the statute reasonably regulates the activity within the limits proscribed by the Constitution.

FREEDOM OF SPEECH

The Plaintiffs engage in "sidewalk counseling." This activity consists of efforts to educate counsel, persuade or inform persons about abortion and alternatives to abortion. This is accomplished through oral expression, protest, displays, signs and leafletting. See affidavits of all Plaintiffs. There is no

question that the Plaintiffs conduct implicates First Amendment rights.

However, the First Amendment does not guarantee the right to communicate one's view's at all times and places or in any manner that may be desired." Heffron v. ISKCON, 452 U.S. 640 (1981).

The Plaintiffs engage in these activities on the public streets and public sidewalks. Many times these are located within 100 feet of the entrances to medical facilities. The statute clearly applies to these locations.

The public sidewalks and streets, including the ones that the statute would apply, constitute "quintessential" public forum for First Amendment purposes. See Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37 (1983).

However, the state may subject such expression whether oral or written or symbolized, by conduct to reasonable time, place, and manner restrictions. These regulations will be found reasonable where they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications." Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37 (1983).

A. CONTENT NEUTRAL

The Supreme Court states that "the principal inquiry in determining content neutrality... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.5. 781, 785 (1989).

The Plaintiffs argue that one may be prosecuted under the statute if negative statements are said to people in the vicinity because the statute uses the word "protest." They argue that the statute would not apply to positive statements and therefore positive statements would be permissible. However, the statute applies not only to oral protest but to "education" and

"counseling." It appears clear that the statute applies to all viewpoints, rather then only certain viewpoints.

Furthermore, evidence provided by the Defendant's show that the legislative history of the statute makes it clear that the statute applies to all viewpoints rather then certain viewpoints. The state has not favored one view point over another as the Plaintiffs contend.

The Court finds the statute in question applies even-handedly to all speakers and the content of their speech. All persons demonstrating are to comply with the statute. The statute does not govern the subject matter of the message.

B. THE REGULATION MUST BE NARROWLY TAILORED, TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST.

The statute is designed to protect access to health care facilities. It protects the persons using a health care facility to do so without being threatened, harassed or assaulted by forced confrontations with demonstrators.

The regulation is unrelated to the content of the message. It is related to safeguarding access to health care facilities. This regulation applies equally, not only to pro life or pro choice protestors, but any others engaged in the activities that the statute addresses. Furthermore, even if the regulation has some incidental effect on some speakers and not others the regulation will be deemed neutral. See Ward v. Rock Against Racism, 491 U.S. 781 (1989).

Plaintiffs argue there are other statutes designed to deal with this problem such as assault, trespass, harassment. However, C.R.S. Section 18-9-122 targets the offensive and disturbing conduct taking place outside health care facilities. It address [sic] the exact source of evil it seeks to remedy.

The Court finds that the "free zone" is narrowly tailored to address these abuses that impede ingress and egress to medical facilities and the regulation promotes a significant

governmental interest that is unrelated to the content of the message.

C. AMPLE ALTERNATIVE MEANS OF COMMUNICATION;

The statutory scheme leaves open ample alternative means of communication. The Plaintiff's message can still reach its intended audience.

The statute only restricts the demonstrators from engaging in their activities within the "free zone " This area constitutes 100 feet of the entrance of a medical facility and within 8 feet of the listener unless the listener consents. The plaintiffs signs and leaflets may be seen at this distance. Speech may also be heard at this distance.

Although, it may be more difficult for the Plaintiffs to force leaflets in the hands of unwilling recipients and their messages upon audiences unable to escape, the Plaintiff's are able to carry on their activities provided they do so outside the "free zone."

OVERBREADTH CHALLENGE

In order for the Court to invalidate the statute there must be a substantial overreach of the statute. "[P]articularly where conduct and or merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

The statute must be so sweeping in its scope as to deter both protected and unprotected speech. The overbreadth doctrine has been applied to certain statute that prohibit certain types of unprotected speech, but may also apply to protected speech. This is applied to ensure that the statute does not censure protected speech. Hoffman Estates, 455 U.S. at 594. It is not for the Court to determine how creative the challenging party must be in conceiving situations where the language of the statute might be applied to protected speech.

In this case the statute does not prohibit speech. The statute only imposes reasonable time, place and manner restraints on the First Amendment activity. The statute does provide objective standards and guidelines for permitting or denying the display of signs, the distribution of literature and/or speaking. All these activities may be engaged in as long as the speakers remain outside the "free zone."

The Court believes the statute will do little to deter protected speech. The Plaintiffs state in their affidavits that they will continue with their protected First Amendment activities. See Affidavits of Plaintiffs.

VAGUENESS CHALLENGE

The law must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104 (1972). In addition the law must provide standards for applying the law. Id. at 109.

The words of the statute are given their commonly accepted and understood meaning. East Lakewood San. Dist. v. District Court, 842 P.2d 233, 235 (Colo. 1992).

The statue uses common ordinary terms. The statute speaks in terms of "oral protest," "counseling," and "education." These are everyday terms in which people of ordinary intelligence would be familiar. The statute also provides exact measurements in which these activities may not take place. This area is known as the "free zone." This zone constitutes the area within 8 feet of a person and the area within 100 feet of a medical care facility.

The Court finds that the statute uses terms that fairly and accurately describe conduct forbidden within the "free zone."

The Court finds the statute gives warning of the prohibited conduct. That the Plaintiffs know how to carry out their activities within the proscribed limits of the statute and know what is expected of them when they are "sidewalk counseling."

PRIOR RESTRAINTS

The Plaintiffs argue that C.R.S. Section 18-9-122(3), imposes a requirement of prior permission before speaking. They claim that under this regulation the private citizens of the state or at least all private citizens in the vicinity of a health care facility are somehow deputized and transformed into agents of the State. And therefore, these private citizens have the power to prohibit the Plaintiffs from engaging in their activities if these citizens do not consent. The Court finds the Plaintiffs argument unpersuasive.

Prior restraints deal with situations where the legislature or other government entities attempt to restrain or forbid certain communications in advance of the time in which they are to occur. This is usually accomplished through licensing or permit schemes.

All prior restraints have one thing in common; they give "public officials the power to deny use of a forum in advance of actual expression." Southeast Promotions v. Conrad, 420 U.S. 546 (1975).

This statute requires no license or permit scheme prior to speaking. It does not forbid the Plaintiffs activities. Therefore, the prior restraint doctrine has no applicability to this statute.

CONCLUSION

The Court addressed all issues set forth in the motions for Summary Judgment and therefore by direct reference or comments made herein disposes of all issues raised in the complaint.

It is therefore ordered that the motion for Summary Judgment of the Defendant's be granted, that C.R.S. Section 18-9-122 as amended is facially constitutional, and that the complaint be, and the same is hereby dismissed.

DONE AND SIGNED IN OPEN COURT this 22nd day of April, 1994.

BY THE COURT:

/s/
Gaspar F. Perricone
District Judge

[certificate of mailing omitted]

[Appendix C]

Colorado Court of Appeals July 13, 1995
No. 94CA0856

Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr.,

Plaintiffs-Appellants,

v.

City of Lakewood, Colorado; Gale A. Norton, in her official capacity as Attorney General of the State of Colorado; and the State of Colorado, Roy Romer, Governor,

Defendants-Appellees.

Appeal from the District Court of Jefferson County
Honorable Gaspar F. Perricone, Judge.
No. 93CV1984.

Division V JUDGMENT AFFIRMED
Opinion by JUDGE RULAND
Sternberg, C.J., and Rothenberg, J., concur

The American Center for Law & Justice, Jay Alan Sekulow, James Matthew Henderson, Sr., Washington, DC; Roger W. Westlund, Thornton, for plaintiffs- appellants.

Gorsuch Kirgis L.L.C., Roger W. Noonan, Maureen Herr Juran, Denver, for defendant-appellee City of Lakewood, Colorado.

Gale A. Norton, Atty. Gen., Stephen K. ErkenBrack, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Carol D. Angel, Sr. Asst. Atty. Gen., Kathie A. Greenwalt Troudt, Asst. Atty. Gen., Denver, for defendants-appellees Gale A. Norton and State of Colo., Roy Romer, Governor.

Fairfield and Woods, P.C., Howard Holme, Denver; Legal Action for Reproductive Action, Celeste Lacy Davis, Roger K. Evans, New York City, for amicus curiae Planned Parenthood of the Rocky Mountains.

Joseph N. de Raismes, III, City Atty., Boulder, for amicus curiae City of Boulder.

The principal issue in this appeal is whether § 18-9-122(3), C.R.S. (1994 Cum.Supp.) violates the right of free speech contained in the First Amendment to the United States Constitution. Plaintiffs, Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., appeal from a summary judgment determining that the statute does not violate the First Amendment. We affirm.

Section 18-9-122, C.R.S. (1994 Cum.Supp.), enacted in 1993, provides:

> (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.
>
> . . . .
>
> (3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any

entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

Prior to this statute's adoption, hearings were conducted before the House and Senate Judiciary Committees of the General Assembly. In one of the hearings before the House Committee, testimony was presented concerning the conduct of some antiabortion protesters at various medical clinics directed both at patients and staff. See Tape Recording of Testimony before House Judiciary Committee concerning H.B. 1209 (February 12 & 16, 1993, 59th General Assembly). This conduct included efforts to block access to the clinics and to intimidate and harass patients and staff in various ways. The committees were also informed, however, that out of 60,000 patients who obtained services at one of the clinics, only seven percent were there to consider abortions. Nevertheless, all patients were subjected to the same treatment by the protesters. See Tape Recording of Testimony before Senate Judiciary Committee concerning H.B. 1209 (March 3, 1993, 59th General Assembly).

The committees also heard testimony that other types of protests such as those made by animal rights activists occur at medical clinics in the United States where the transplant of animal organs is performed or assessed. The witness also indicated that protesters create a particularly difficult situation for persons with physical disabilities who lack the physical capability to move through crowds. See Tape Recording of Testimony before House Judiciary Committee concerning H.B. 1209 (February 12 & 16, 1993, 59th General Assembly).

Following passage of the statute, plaintiffs filed this action seeking a declaratory judgment that s 18-9-122(3), C.R.S. (1994 Cum.Supp.) violates the First Amendment on its face and that a permanent injunction should enter against enforcement of the statute by defendants, David J. Thomas (as District Attorney), the City of Lakewood, Gale A. Norton (as Attorney General), and the State of Colorado.

In their complaint and affidavits filed relative to the summary judgment, plaintiffs state that they are "sidewalk counselors" who offer abortion-bound women alternatives to that medical procedure. Plaintiffs state that they educate, counsel, persuade, or inform pedestrians and occupants of motor vehicles in areas adjacent to medical clinics about abortion and abortion alternatives.

To assist in this effort, plaintiffs prepare and distribute written material including cards, leaflets, and pamphlets. Plaintiff Hill uses a fetal model in her counseling and displays it to the public. Posters are also used. Plaintiffs claim that it is impossible at times both to remain on the sidewalk and stay at least eight feet away from others in order to continue speaking, displaying signs, or otherwise protesting or counseling.

I

Section 18-9-122(3) incorporates the so-called "bubble" concept designed to allow communication between protesters and others but to separate the protesters by an eight-foot distance. The statute applies to public sidewalks and streets which are areas protected by the First Amendment. See Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L.Ed.2d 420 (1988); Denver Publishing Co. v. City of Aurora, 896 P.2d 306 (Colo.1995).

Plaintiffs contend that the statute is unconstitutional for a number of reasons. First, they argue that the statute is an improper "content based" regulation which is directed only at them and applies to all forms of written and oral communication. Second, they assert that the statute is overbroad because it infringes upon their right of free speech more than necessary to accomplish the goal of providing access to health care facilities. We are not persuaded by either argument.

Initially, we address whether a presumption of constitutionality applies to s 18-9-122(3). As our supreme court held in Denver Publishing Co. v. City of Aurora, supra, if the

statute is deemed to be a "content-neutral" statute, plaintiffs must introduce competent evidence that the regulation in fact burdens the exercise of free speech. The burden then shifts to defendants to demonstrate that the statute withstands application of the appropriate constitutional standard of review.

If, on the other hand, the statute is intended to apply only to plaintiffs because of their beliefs and viewpoint regarding abortion, then Denver Publishing Co. v. Aurora, supra, suggests that there may be a presumption against its constitutionality. Cf. People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo.1985).

The next issue then is whether the statute is content-neutral, that is, whether the statute is directed only to anti-abortion protesters and their viewpoint.

In Madsen v. Women's Health Center, Inc., 512 U.S. ----, 114 S. Ct. 2516, 129 L.Ed.2d 593 (1994), the United States Supreme Court addressed the provisions of a mandatory injunction issued by a Florida state court against protesters at medical clinics in this context. We view the analysis of the Court as instructive here.

Like the injunction entered in Madsen, ε 18-9-122(3) does not address only the speech of anti-abortion protesters. The statute would impose the same restrictions upon protesters demonstrating in favor of abortion. The law would also apply to protest activity directed at patients requiring or seeking advice relative to an organ transplant. Accordingly, applying the analysis of Madsen, we conclude that § 18-9-122(3) is content-neutral because the specific viewpoint of any person who protests at a health care facility is not relevant to a determination whether a violation of the statute has occurred. See American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.1995) (upholding constitutionality of the Federal Freedom of Access to Clinics Entrances Act).

Given our determination that the statute is content-neutral,

Madsen indicates that the constitutionality of § 18-9-122(3) must be analyzed under the criteria stated in Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989); see also Denver Publishing Co. v. City of Aurora, supra. The Court in Ward confirmed its holding in prior cases that, even on public streets and sidewalks, the government may impose reasonable restrictions on the time, place, or manner of speech. However, those restrictions must be "narrowly tailored," that is, the restrictions must limit free speech only to the extent reasonably necessary to serve a significant governmental interest. Otherwise, the statute is deemed "overbroad." Finally, it must appear that there are "ample alternative channels" for communication of the information.

We hold that § 18-9-122(3) meets the enumerated constitutional requirements.

First, the statute advances a significant governmental interest, namely, to ensure the safety and unobstructed access for patients and staff entering and departing from health care facilities.

Second, the statute does not burden speech more than is reasonably necessary because plaintiffs may continue to communicate with the patients and staff at a distance of eight feet or more. Indeed, the restriction merely is directed at depriving protesters of the opportunity to intimidate or make other physical contact with the patients or staff.

Finally, in addition to oral communication, posters and signs may be made visible at eight feet with the result that reasonable alternatives to face-to- face communication and direct pamphlet handouts are available. Accordingly, we conclude that the trial court did not err in concluding that defendants satisfied their burden to demonstrate that the statute satisfied the applicable constitutional requirements. Further, to the extent that Edwards v. City of Santa Barbara, 883 F.Supp. 1379 (S.D.Cal. No. 94-2243 RG (JRX), March 14, 1995) is inconsistent with the result we reach here, we decline to follow that case.

II

Plaintiffs next contend that § 18-9-122(3) is unconstitutionally vague. Specifically, they argue that a person of common intelligence will not be able to understand what conduct is prohibited in the context of "knowingly approach." They further contend that the terms "consent," "protest," and "counseling and education" fail to meet constitutional requirements for definiteness. We disagree with all of these contentions.

The term "knowingly" is defined in s 18-1-501(6), C.R.S. (1986 Repl.Vol. 8B) of the Criminal Code. A protester acts knowingly if the protester is aware that his or her conduct will cause the protester to be less than eight feet from someone entering or leaving the health care facility without consent. See People v. Krovarz, 697 P.2d 378 (Colo.1985).

Because the remaining terms are not technical in nature, we must apply the common usage of those words. Section 2-4-101, C.R.S. (1980 Repl.Vol. 1B). To the extent that plaintiffs seek to contrast alternative definitions of the words used, we must apply a common definition that is not vague. See Frisby v. Schultz, supra; City of Englewood v. Hammes, 671 P.2d 947 (Colo.1983).

Thus, as pertinent here, "protest" refers to written or oral communication advocating a viewpoint on medical treatment and procedures. See Webster's Third New International Dictionary 1823. "Consent" refers to oral communication or unmistakable physical conduct manifesting agreement. See Webster's Third New International Dictionary 482. "Counseling and education" refers to efforts to present information or guidance to persons entering or leaving a health care facility.

III

Plaintiffs also contend that s 18-9-122(3) constitutes an unconstitutional prior restraint on speech because the consent of a patient is required before a protester may approach within less than eight feet but no time deadline for the patient's consent

is provided. Further, they argue that private citizens have unlimited discretion to determine whether consent will or will not be given without having to apply reasonable guidelines. Finally, they complain that there is no judicial review provided in the statute to determine whether the private citizen's discretion has been exercised in a reasonable fashion. There is no merit in these contentions.

Statutes which have been held unconstitutional as a prior restraint on free speech ordinarily involve a governmental or other entity that has authority to permit or not to permit certain activities in a public forum. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975). We are not aware of any authority that would extend this doctrine to impose limitations upon the right of a private citizen to determine whether to permit others to confront that individual concerning medical care or treatment.

The judgment is affirmed.

CHIEF JUDGE STERNBERG and JUDGE ROTHENBERG, concur.

[Appendix D]

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC593
CERTIORARI TO THE COLORADO COURT OF APPEALS, 94CA0856
DISTRICT COURT, JEFFERSON COUNTY, 93CV1984

ORDER OF COURT

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Petitioners,

v.

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; CITY OF LAKEWOOD, COLORADO; GALE NORTON, in her official capacity as Attorney General of the State of Colorado ; and THE STATE OF COLORADO, ROY ROMER, Governor,

Respondents

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 26, 1996.

[service list omitted] [seal omitted]

[Appendix E]

Supreme Court of the United States

No. **95-1905**

LEILA JEANNE HILL, AUDREY HIMMELMANN, and EVERITT W. SIMPSON, JR.,

Petitioners

v.

COLORADO, ET AL.

ORDER ALLOWING CERTIORARI.
Filed February 24, 1997.

The petition herein for writ of certiorari to the Court of Appeals of Colorado is granted.

[Appendix F]

Supreme Court of the United States

No. **95-1905**

LEILA JEANNE HILL, AUDREY HIMMELMANN, and EVERITT W. SIMPSON, JR.,

Petitioners

v.

COLORADO, ET AL.

ON WRIT OF CERTIORARI to the Court of Appeals of Colorado.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and the case is remanded to the Court of Appeals of Colorado for further consideration in light of *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. ___ (1997).

IT IS FURTHER ORDERED that the petitioners Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., recover from Colorado, et al., Three Hundred Dollars ($300.00) for their costs herein expended.

February 24, 1997

Clerk's costs: $300.00

[Appendix G]

COLORADO COURT OF APPEALS ORDER
No. 94CA0856

Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr.,

Plaintiffs-Appellants,

v.

City of Lakewood, Colorado; Gale A. Norton, in her official capacity as Attorney General of the State of Colorado; and the State of Colorado, Roy Romer, Governor,

Defendants-Appellees.

This case was remanded to the Colorado Court of Appeals by the United States Supreme Court for reconsideration in light of the Supreme Court's opinion in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. ___, ___ L.Ed.2d ___, 117 S. Ct. 588 (1997).

Having review the opinion in *Schenck*, the Court now ORDERS that the parties file simultaneous briefs, not exceeding ten pages in length, addressing the following issue:

Is the eight-foot floating bubble contained in § 18-9-122, C.R.S. (1996 Cum. Supp.) constitutionally permissible?

The briefs of the parties shall be filed no later than Wednesday, May 14, 1997.

Division V:

Sternberg, C.J.

Ruland, J.

Rothenberg, J.

This Order is issued this 24th day of April, 1997.

[service stamp omitted]

[Appendix H]

COLORADO COURT OF APPEALS June 26, 1997
No. 94CA0856

Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr.,

Plaintiffs-Appellants,

v.

City of Lakewood, Colorado; Gale A. Norton, in her official capacity as Attorney General of the State of Colorado; and the State of Colorado, Roy Romer, Governor,

Defendants-Appellees.

Appeal from the District Court of Jefferson County
Honorable Gaspar F. Perricone, Judge
No. No. 93CV1984

Division V JUDGMENT AFFIRMED
Opinion by JUDGE RULAND
Sternberg, C.J., and Rothenberg, J., concur

The American Center for Law & Justice, Jay Alan Sekulow, James Matthew Henderson, Sr., Washington, D.C.; Roger W. Westlund, Thornton, for Plaintiffs- Appellants.

Gorsuch Kirgis L.L.C., Roger W. Noonan, Maureen Herr Juran, Denver, for Defendant-Appellee City of Lakewood, Colorado.

Gale A. Norton, Attorney General, Martha Phillips Allbright, Chief Deputy Attorney General, Richard A. Westfall, Solicitor General, Carol D. Angel, Assistant Attorney General, Denver, for Defendants-Appellees Gale A. Norton and State of Colorado, Roy Romer, Governor.

Fairfield and Woods, P.C., Howard Holme, Denver; Legal Action for Reproductive Action, Celeste Lacy Davis, Roger K. Evans, New York City; Kevin C. Paul, Denver, for Amicus Curiae Planned Parenthood of the Rocky Mountains and The Center for Reproductive Law & Policy, Inc.

Joseph N. de Raismes, III, City Attorney, Boulder, for Amicus Curiae City of Boulder.

In Hill v. City of Lakewood, 911 P.2d 670 (Colo.App.1995) (Hill I), we affirmed the judgment of the district court determining that § 18-9- 122, C.R.S. (1996 Cum.Supp.) did not violate the First Amendment. Thereafter, the United States Supreme Court announced Schenck v. Pro-Choice Network, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).

The Supreme Court then granted a petition for certiorari to review Hill I. Hill v. Colorado, --- U.S. ----, 117 S.Ct. 1077, 137 L.Ed.2d 213 (1997). In disposition of that certiorari petition, the court has remanded the case to us for reconsideration in light of Schenck.

We requested supplemental briefs from the parties relative to the impact of Schenck on § 18-9-122. Having reviewed and considered those submissions, we again affirm the district court's judgment.

Section 18-9-122 provides:

> (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.
>
> . . . .
>
> (3) No person shall *knowingly* approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(emphasis supplied)

As noted in Hill I, the statute was adopted by the General Assembly out of concern for public safety issues presented by the conduct of some protestors at various medical clinics that is directed both at patients and staff. These concerns include access for persons with various disabilities who lack the physical capability to move through crowds of protestors.

In Schenck, the Supreme Court addressed a First Amendment challenge to an injunction issued by the United States District Court in response to the conduct of protestors at abortion clinics in the Western District of New York. As pertinent here, the injunction banned "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances" to a clinic. This part of the injunction is referred to as the "fixed buffer zone."

In addition, the injunction banned demonstrations "within fifteen feet of any person or vehicle seeking access to or leaving" a clinic--the "floating buffer zone."

The court upheld the fixed buffer zones around the doorways, driveways, and driveway entrances. The court stated:

> These buffer zones are necessary to ensure that people in vehicles trying to enter or exit the clinic property or clinic parking lots can do so.... [T]he record shows that protestors purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots.

Schenck v. Pro-Choice Network, supra, 519 U.S. at ----, 117 S.Ct. at 868, 137 L.Ed.2d at 22-23.

With reference to the floating buffer zone, the court stated:

> We strike down the floating buffer zones around people entering and leaving the clinics because they burden more speech than is necessary to serve the relevant governmental interests. The floating buffer zones prevent defendants [the protestors] . . . from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks. . . . Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment and speech in public areas is at its most protected on public sidewalks. . . .

Schenck v. Pro-Choice Network of Western New York, supra, 519 U.S. at ----, 117 S.Ct. at 868, 137 L.Ed.2d at 22-23.

The court also overturned the floating buffer zones around vehicles. The court held that a more limited injunction that keeps protestors away from driveways and parking lot entrances is sufficient to ensure that drivers are not confused about how to enter the clinic and are able to gain access to its driveways and the parking lots safely and easily.

Plaintiffs now contend that, to the extent the statute creates a floating buffer zone of eight feet, Schenck mandates that we declare the statute unconstitutional. They rely upon language in Schenck to the effect that there is no right to be left alone on a public sidewalk for the purposes of leafletting and that persons using the sidewalk must tolerate insulting and even outrageous speech. They further rely upon the determination in Schenck that 15 feet is to great a distance for normal conversation. Plaintiffs finally rely upon the observation in Schenck that it is difficult to determine when one is less than a specified distance from a patient or staff member, thus making compliance with the statute difficult. We are not persuaded by these arguments.

The court in Schenck expressly declined to hold that a valid governmental interest in ensuring ingress and egress to a medical clinic may never be sufficient to justify a zone of separation between individuals entering and leaving the premises and protesters. Further, in Madsen v. Women's Health Center, Inc., 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), the court held that the applicable analysis to assess the statute before us is that adopted in Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Specifically, the Madsen court stated:

> If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in Ward v. Rock Against Racism, supra, 491 U.S., at 791, 109 S.Ct., at 2753-2754 and similar cases. Given that the forum around the clinic is a traditional public forum . . . we would determine whether the time, place, and manner regulations were 'narrowly tailored to serve a significant governmental interest.'

Madsen v. Women's Health Center, Inc., supra at 764, 114 S.Ct. at 2524.

As noted in Hill I, and confirmed by the analysis in Schenck, § 18-9- 122 is a content-neutral, generally applicable statute supported by a valid governmental interest. The issue then becomes whether the restrictions in the form of an eight-foot floating buffer zone are narrowly tailored to serve that governmental interest. In this context, it must appear under Ward that ample alternative methods are available for communication of the protesters' information. Applying the Ward rationale here, we conclude that the statute meets constitutional muster.

Initially, we reject plaintiffs' claim that the statute is unconstitutional because of the determination in Schenck that a 15-foot floating buffer precluded protesters from expressing their views from a normal conversational distance. In our view, a lesser distance of eight feet is sufficient to protect that type of speech on a public sidewalk--even for the insulting and outrageous language protected by the First Amendment. Further, under the statute a protester is permitted to approach to a distance of less than eight feet with consent of the patient or staff member.

Finally, with reference to the fact that leafletting may not take place within 100 feet of the entrance to the medical clinic unless consent is given, we view the significant governmental interest here as sufficient to warrant the requirements of the statute. Specifically, as noted in Hill I, a committee of the General Assembly considered the fact that out of 60,000 patients who obtained services at one of the clinics, only 7 percent were there to consider abortions. Nevertheless, all patients were subjected to the same treatment by the protesters.

The committee also heard testimony that the efforts of protesters create a particularly difficult task for persons with disabilities who lack the physical ability to move through crowds.

As a result, in our view the governmental interest of ensuring

easy access to those with physical disabilities by creating an eight-foot buffer zone within a 100-foot area is amply sufficient to justify the statute. Stated otherwise, it seems to us that it is not unreasonable to require protesters to give way to a distance of eight feet so that one with physical disabilities has unimpeded access to a medical clinic especially when the protester can still vocally express his or her views on the issue at hand in a normal conversational voice.

Finally, ample alternate channels for communication other than leafletting are available within 100 feet of the entrance to the health care facility in the form of speech for those without hearing disabilities, placards for those with hearing deficiencies, and other visual items for the sighted patients and staff.

With reference to plaintiffs' complaint that it is difficult to ascertain and maintain an eight-foot distance from each non-consenting patient and staff member, we note that the statute precludes only improper contact made "knowingly." Hence, a successful prosecution could not be based upon an inadvertent violation.

Accordingly, we conclude that Schenck does not compel the conclusion that § 18-22-109 violates the First Amendment.

The judgment is affirmed.

CHIEF JUDGE STERNBERG and JUDGE ROTHENBERG, concur.

[Appendix I]
SUPREME COURT, STATE OF COLORADO
CASE NO. 97SC630
CERTIORARI TO THE COLORADO COURT OF APPEALS, 94CA0856
DISTRICT COURT, JEFFERSON COUNTY, 93CV1984

ORDER OF COURT

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Petitioners,

v.

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; CITY OF LAKEWOOD, COLORADO; GALE NORTON, in her official capacity as Attorney General of the State of Colorado; and THE STATE OF COLORADO, ROY ROMER, Governor.

Respondents.

Upon consideration of the Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, GRANTED as to the issue set forth below, and the briefs shall be filed as follows:

(a) Petitioners' Opening Brief shall be filed within forty days from this date;

(b) Respondents' Answer Brief shall be filed within thirty days from receipt of the Opening Brief;

(c) Petitioners' Reply Brief may be filed within fourteen days from receipt of the Answer Brief.

Pursuant to C.A.R. 54(a), the record on file will be treated as though sent up in response to a formal writ.

The issue as announced by the Court this day is as follows:

Whether the court of appeals erred in holding that § 18-9-122, 6 C.R. S. (1997), was constitutional upon the United States Supreme Court's remand to the court of appeals to reconsider the statue under Schenck v. Pro-Choice Network, 117 S. Ct. 855 (1997).

DENIED AS TO ALL OTHER ISSUES.

BY THE COURT, EN BANC, JANUARY 12, 1998.

[service list omitted] [seal of court omitted]

[Appendix J]
THE COURT OF APPEALS OF
THE STATE OF COLORADO

Case Number 94CA0856

ORDER

LEILA J. HILL ET AL V DAVID J. THOMAS ET AL

Upon consideration of the Petition for Rehearing filed by the Appellant herein the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including September 18th 1995, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain if effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Ruland, J.
Sternberg, C.J.
Rothenberg, J.

DATED: August 17, 1995

[service stamp omitted] [seal omitted]

[Appendix K]
THE COURT OF APPEALS
OF THE STATE OF COLORADO

Case Number 94CA0856

ORDER

LEILA J. HILL ET AL V CITY OF LAKEWOOD ET AL

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including August 25, 1997, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Ruland, J.

Sternberg, C.J.

Rothenberg, J.

DATED: July 24, 1997

[service stamp omitted] [seal omitted]

[Appendix L]
SUPREME COURT, STATE OF COLORADO
CASE NO. 97SC630
CERTIORARI TO THE COLORADO COURT OF APPEALS, 94CA0856
DISTRICT COURT, JEFFERSON COUNTY, 93CV1984

MANDATE

LEILA JEANNE HILL; AUDREY HIMMELMANN; and EVERITT W. SIMPSON, JR.,

Petitioners,

v.

DAVID J. THOMAS, in his official capacity as District Attorney for the First Judicial District of the State of Colorado; CITY OF LAKEWOOD, COLORADO; GALE NORTON, in her official capacity as Attorney General of the State of Colorado; and THE STATE OF COLORADO, ROY ROMER, Governor,

Respondents.

This cause having been brought to this court on a writ of certiorari to the Colorado Court of Appeals to review the judgment of said court, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

IT IS ORDERED and adjudged that the judgment of the court of appeals is AFFIRMED.

NOW THEREFORE, jurisdiction of this cause is returned to the court of appeals.

WITNESS, the HONORABLE MARY J. MULLARKEY, Chief Justice of our Supreme Court and the Seal thereof,

affixed at my office in the City and County of Denver, this 10th day of March 1999.

MAC V. DANFORD
Clerk of the Supreme COURT

/s/
Deputy Cle

[service list omitted] [seal of court omitted]

[Appendix M]

[The First Amendment states:]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

[The Fourteenth Amendment, in pertinent part, states:]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1

[Colorado Revised Statute section 18-9-122 provides:]

Preventing passage to and from a health care facility--engaging in prohibited activities near facility

(1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide

concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

(4) For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.